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SUPREME COURT, U.S.
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No. 92-1933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATUXENT INSTITUTION BOARD OF REVIEW,
Petitioner,

v.

CLARENCE J. HANCOCK,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

I. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER A LIBERTY INTEREST IN PAROLE RELEASE CAN EVER BE CREATED SOLELY BY THE ACTS OF STATE OFFICIALS.

Respondent's Brief in Opposition ("Br.") confirms that the decision of the Court of Appeals of Maryland is

in conflict with Jago v. Van Curen, 454 U.S. 14 (1981), because respondent does not dispute that the actions of State officials form the sole basis of the lower court's holding that respondent has a constitutionally-protected liberty interest in parole. The State's actions in this case are indistinguishable from the conduct that this Court in Jago held did not give rise to a liberty interest. Review is warranted to decide whether conduct alone can ever establish such a constitutional right and whether this Court's per curiam decision in Jago requires reversing the Court of Appeals' holding that the State's actions here "created . . . a liberty interest in parole release." (App. at 58a.)

In asserting that "[u]nder the Patuxent statute, Mr. Hancock's Order of Parole created a protected liberty interest in retaining parole," Br. at 5-6 (citation omitted), respondent begs the first issue that petitioner asks this Court to review because the Court of Appeals

engaged in no analysis of that statute. Despite this Court's repeated emphasis that pertinent State law must be scrutinized in determining whether a prisoner has a liberty interest entitled to due process protection, see Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989); Board of Pardons v. Allen, 482 U.S. 369 (1987); Olim v. Wakinekona, 461 U.S. 238 (1983); Hewitt v. Helms, 459 U.S. 460 (1983); Jago v. Van Curen, 454 U.S. 14; Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Wolff v. McDonnell, 418 U.S. 539 (1974), the Court of Appeals conducted no analysis of "the language of the relevant statutes and regulations." Kentucky Dept. of Corrections v. Thompson, 490 U.S. at 461.

The lower court instead confined its constitutional inquiry to the actions of State officials in granting

respondent parole. Jago and the decisions of other courts make clear that those actions, by themselves, do not create a liberty interest. See Bryant v. State, 848 F.2d 492 (4th Cir. 1988); Ingrassia v. Purkett, 985 F.2d 987, 988 (8th Cir. 1993); Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 235-238 (6th Cir. 1991); Winters v. Solem, 444 N.W.2d 722 (S.D. 1989). See also Johnson v. Pennsylvania Board of Probation and Parole, 532 A.2d 50, 52 (Pa.Cmwlth. 1987).

Neither that State conduct, nor the Court of Appeals' determination that petitioner was estopped from asserting respondent was ineligible for parole, provides any basis for the court's holding that respondent had a constitutional entitlement in parole release. See Connecticut Board of Pardons v. Dumschat, 452 U.S. at 465. See also Biser v. Town of Bel Air, 991 F.2d 100, 104 (4th Cir. 1993) ("A subsequent order by a court of

equity estopping a municipality from relying on its legal right does not represent a legitimate claim of entitlement.").

Respondent asserts that Jago is factually distinguishable from this case and that Morrissey v. Brewer, 408 U.S. 471 (1972), "governs the process due Mr. Hancock." Br. at 5. But Morrissey addressed a parolee's interest "in his continued liberty" and involved the very different scenario where "[t]he parolee ha[d] been released from prison. . . ." 408 U.S. at 482 (emphases added). Respondent does not dispute that simultaneously with being served with an Order of Parole, the Patuxent Institution Board of Review served him with a parole revocation warrant (App. 14a-15a), with the result that, as one of the courts below explicitly found, he was "never on parole" because his parole was "revoked before he was released. . . ." (App. at 108a, 111a.) See also (App. at 131a) (circuit court opinion)

(stating that respondent "has not been on parole physically").

Moreover, the Court of Appeals found no need to even rely on Morrissey, finding instead that the State's decision to parole respondent "may not, without complying with due process, be rescinded based on new information discovered before physical release has actually occurred." (App. at 61a) (emphasis added). Thus, the court found that respondent had a liberty interest in parole not because he physically had been released from incarceration as was the parolee in Morrissey, but solely because the State provided him with an Order of Parole. This Court should review this case and decide whether such a constitutional right can arise out of that State conduct.

II. THIS CASE PRESENTS THE SIGNIFICANT ISSUE OF FIRST IMPRESSION OF WHAT NOTICE IS REQUIRED WHEN REVOKING THE PAROLE OF A PRISONER IN A MENTAL HEALTH FACILITY.

Review is also warranted because the constitutional standard that the Court of Appeals applied seriously impairs the State's authority to revoke the parole of an inmate who no longer responds favorably to mental health treatment and who is deemed to pose a threat to the safety of the community. The Court of Appeals held the State may not constitutionally revoke the parole of such an inmate in the absence of criminal behavior or "the institutional equivalent of criminal conduct" (App. at 68a-69a), unless the inmate is explicitly notified in advance of the precise circumstances that could lead to the loss of liberty. This issue has not been addressed by this Court either in Morrissey or any other case, and yet is one that affects the use of parole as a therapeutic

technique by all governmental institutions that treat mentally ill inmates.

Respondent concedes that the notice component of the due process clause requires only that "individuals be given fair warning of those acts that may lead to a loss of liberty." Br. at 13 (citation omitted). Respondent received at least as much notice as that which is constitutionally due in an involuntary civil commitment proceeding, where an individual may lose his or her liberty indefinitely as long as that person is mentally ill and poses a danger to himself and others. See Addington v. Texas, 441 U.S. 418 (1979). Indeed, the governing statute explicitly warned respondent that early parole required that he remain an "eligible person" who is "likely to respond favorably to the programs and services provided at Patuxent" and whose release "will not impose an unreasonable risk on society." Md. Ann. Code Art. 31B, §§ 11(b)(2), 1(g) (1957, 1990 Repl.

Vol.).

Furthermore, the statute governing his tenure at Patuxent was not the only source of fair warning; in its decision revoking his parole, Patuxent noted that it issued "numerous directives regarding his conduct," cautioned him a number of times regarding the need to satisfactorily participate in treatment, and provided him with "[t]reatment plans detailing specific areas of concern." (App. at 118a.) This Court should resolve the question of whether due process requires more of the State in order to revoke the parole of a mentally ill inmate.